SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 455

CLAYTON H. STEIF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.,

and

DIAMOND ALKALI COMPANY,

Respondents.

BRIEF OF RESPONDENT, DIAMOND ALKALI COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement of Question Presented

There being no proof that respondent, Diamond Alkali Company had knowledge, prior to the accident, of the contents of the label used by respondent, J. A. Sexauer Manufacturing Co., Inc., and accordingly, no issue of fact to be determined by the jury, should this Court grant certiorari to review the unanimous decision, of the Second Circuit, which affirmed a judgment in favor of respondent, Diamond Alkali Company, against petitioner, entered upon the granting of a motion for a direction of a verdict made by respondent at the conclusion of plaintiff's case?

Statement of the Case

This case is one in which plaintiff sued to recover damages for personal injuries. In substance, in the complaint, plaintiff alleged that, in the course of using a product, packaged and sold by J. A. Sexauer Manufacturing Co., Inc., known as "Mule-Kick" and advertised as opening clogged drains, he was burned and permanently blinded by a spray containing "Mule-Kick"* which issued from a hole in the pipe which he was attempting to clear. Breach of warranty and negligence were charged against defendant Diamond Alkali Company.

During the trial the breach of warranty theory was abandoned, and the trial proceeded on a theory of negligence. At the close of the plaintiff's case, the Court granted a motion for a direction of a verdict in favor of this respondent.

Plaintiff's case, as stated in his Appellate Brief:

> " . . . against Diamond Alkali Company is based on Diamond's role in checking Sexauer's label, ["Mule-Kick"] from time to time, and making no suggestions regarding the inadequate warning on that label when Diamond knew of the dangerous properties of the material which Sexauer was selling to an unwarned and unsuspecting public." (Brief p. 8)

Diamond's knowledge of the language used on the can was attempted to be established through the testimony of Mr. Sexauer, an officer of defendant, J. A. Sexauer

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* Petitioner knew of the danger involved in using this product. He said, "I never liked to use this "Mule-Kick" Pipe Cleaner and I was always very careful when I had to use it." (261a)

Manufacturing Co., Inc., who was called by plaintiff as a witness. He testified that the label on the can was prepared long before he took over the job of purchasing, the date of this is not indicated and that the information on the can came from the chemists of the organizations from which Sexauer bought the material at that time (677a, 678a). The witness said also that the information on the label had been checked by Diamond Alkali Company (680a); that Diamond Alkali Company sold caustic soda to Sexauer commencing about 1961;* that before Diamond Alkali Company had any connection with Sexauer, other manufacturers sold caustic soda to it, at least as far back as 1931; that the label and the directions on the can were first used about 1931; that no changes were made in the language used on the can from 1931 to the time of the occurrence (677a-681a).

This testimony establishes that the label and directions, on the can used by Mr. Stief, were identical to those placed on all the cans of "Mule-Kick" sold by Sexauer from about 1931. This was 30 years before Diamond Alkali Company sold caustic soda to Sexauer. The proof of Diamond's knowledge concerning the language of the label, is that the information on the label had been checked by Diamond. (680a). There was no showing when Diamond checked. The record is barren of evidence to establish that this was done prior to the accident.

The evidence, with respect to Diamond's knowledge, deserves the characterization given it by Judge Friendly, as follows:

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*There is no dispute that Diamond Alkali Company sold the caustic soda to J. A. Sexauer Manufacturing Co., Inc., and delivered it, in 400 pound drums, to Sexauer's packager which packaged it in small cans and placed Sexauer's label on it.

"Although plaintiff claims there is evidence that Diamond had seen the label on the can, the testimony was highly equivocal and surely does not show that Diamond had seen the label before it sold the caustic soda that was repackaged into the cans used by Stief in January, 1961, or that if it had protested upon seeing the label, the accident would have been avoided. . . . On the facts here presented, there would have been no rational basis for a jury's concluding that Diamond had failed to exercise reasonable care with respect to the plaintiff." (P. 1874 of Unofficial Report)

There is no evidence at all to support petitioner's claim that Diamond "knew before this accident that Sexauer's label did not warn of spattering and held forth false assurances of safety therefrom and did nothing about it." (P. 10 of the Petition) This charge is made at two places on Page 10 and repeated twice on Page 11 of the Petition. It is made again at Page 13.

The Affirmance by the Court of Appeals

The opinion of the Court of Appeals, with respect to the claim against Diamond is found at Pages 1867, 1868 and 1872 through 1874 of the unofficial report of the case.

"The gist of Stief's argument is that, assuming that Diamond knew the nature of Sexauer's Mule-Kick label, Diamond should have insisted upon, or exerted some power or pressure upon Sexauer to provide, a label which would have avoided this accident. However, as in the case of the Sexauer label, since the cause of the accident is unknown, what could Diamond have suggested be added to the label even assuming such a policing power?

"Since on the facts here presented, there would have been no rational basis for a jury's conclusion that the accident was caused by an inadequate label, the trial court correctly dismissed the case against Diamond.

"Judgment dismissing the complaint against Sexauer and Diamond affirmed. No costs."

This determination, found in the prevailing opinion, was supported by the language of the dissenting opinion, Friendly, Circuit Judge, who concurred as to Diamond. His concurrence is found at Pages 1872 to 1874, inclusive, of the unofficial report. In substance, Judge Friendly held that Diamond sold caustic soda to commercial and industrial buyers in 400 pound drums which were labelled appropriately.*

He said, also, that regardless of the possible obligation of a manufacturer which sells raw material in large containers to many purchasers to repack under their own name and labels, the testimony, on trial, failed to establish that Diamond had any knowledge of the language of the label prior to the accident which resulted in plaintiff's injuries. Judge Friendly's opinion was: "On the facts here presented, there would have been no rational basis for a jury's concluding that Diamond had failed to exercise reasonable care with respect to the plaintiff." (Page 1874)

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* "WARNING: CONTAINS CAUSTIC SODA. Burns skin and eyes. Avoid contact with body or clothing. Do not take internally. When handling wear goggles or face-shield and avoid all skin contact. While making solutions, add Caustic Soda slowly to surface to avoid violent spattering. In case of accidental skin contact, flush affected parts with water and wash with vinegar. For eyes, flush freely with water for at least 15 minutes. Obtain medical attention."

The Power of the Court to Direct a Verdict, for Insufficiency of Evidence, Presents no Novel Question

Baltimore & Carolina Line, Inc. v. *Redman,* 295 U.S. 654
G. E. Herron v. *Southern Pacific Co.,* 283 U.S. 91
Neeley v. *Eby Construction Co.,* 386 U.S. 317
Lavender v. *Kurn,* 327 U.S. 645

The authority of the courts to direct a verdict in favor of defendant, when the evidence is insufficient to sustain a verdict for plaintiff, was recognized in *Baltimore & Carolina Line, Inc.* v. *Redman, supra.* In this case the court stated that the right to reserve decision and to subsequently direct judgment for one party, when the jury returned a verdict for the other, was part of the common law prior to the adoption of the Seventh Amendment. The right of trial by jury protected by the Amendment is to be considered in the light of the existence of such common law. The Supreme Court affirmed a reversal by the Court of Appeals because, as a matter of law, the evidence was insufficient to sustain a verdict for plaintiff. It was held further that the judgment of the Court of Appeals should embody a direction for a judgment of dismissal on the merits which would be the equivalent of a judgment for defendant on a verdict directed in its favor.

In *G. E. Herron* v. *Southern Pacific Co., supra,* the Constitution of the State of Arizona provided that the defense of contributory negligence or of assumption of risk was, in all cases, to be left to the jury. Nevertheless, in this diversity case, it was held that the direction of a verdict in favor of defendant was proper since the evidence of

contributory negligence or assumption of risk was conclusive and the question was one of law so that the court had the right and duty to direct a verdict for defendant. *Herron* was not a Federal Employers Liability Act case.

In a most recent decision, *Neeley* v. *Eby Construction Co., supra,* the Court of Appeals held that the evidence was insufficient to establish either respondent's negligence or proximate cause and reversed the judgment of the District Court with instructions to dismiss the action. On appeal, it was held that Appellate Courts are not barred by the Seventh Amendment's right of jury trial from granting a judgment n.o.v., the Supreme Court, at Page 322, used the following language:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v."

Lavender v. *Kurn, supra,* was a Federal Employers Liability Act case. There, it was held that the right to trial by jury in such cases was a substantial part of the cause of action and a judgment of an appellate court setting aside a verdict for the plaintiff could not be sustained unless there was a complete absence of probative facts to support the conclusion of the jury.

The question left undecided in *Byrd** is not involved herein.

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* *Byrd* v. *Blue Ridge Cooperative,* 356 U.S. 525, Page 537, Footnote: "Our conclusion makes unnecessary the consideration—and we intimate no view upon—the constitutional question whether

Comment on the Restatement (Second) of Torts, § 388 (1965)

A reading of the language of the restatement indicates that it is not intended to apply to a situation in which a manufacturer sells raw material in large containers to many purchasers for a wide variety of uses, and the particular purchaser has repacked it under his own name and label. This is the opinion of Circuit Judge Friendly, Page 1873, Unofficial Report. His conclusion, found therein, is worth repeating:

> "I am far from saying that circumstances could never arise in which a manufacturer like Diamond might be subjected to liability for inadequate labelling by an intermediary like Sexauer, as, for example, if it knew a packager who had purchased significant quantities of its caustic soda was putting this into the market with no warning whatever, or if the packager had submitted and obtained approval for a label that was highly misleading. But the facts here are at the opposite end of the spectrum from these hypotheticals."

Inaccuracies in Petition

1. At Page 5 of the Petition, in a footnote, it is claimed that the Court erroneously excluded the label used by Diamond. The language is:

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the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action."

"But despite the manifest relevance of that evidence as against both defendants, the learned Trial Judge erroneously excluded that label and its proof from the case and withheld it from the jury."

In support of this statement, reference is made to Page 700a of the record. Page 700a does not refer to the offer. Moreover, the evidence was accepted, against Diamond, at Page 601a.

2. At Page 6 of the Petition, it is maintained that Diamond's label on its drums makes clear there is no question that this Caustic Soda, when put into solution, would "violent[ly] spatter." Diamond's label does not make this clear. In fact, the directions on the label are calculated to avoid spattering, "while making solutions, add caustic soda slowly to surface to avoid violent spattering." When petitioner put the caustic soda in water, there was no spattering because he followed the directions. It is not correct that the language on the label established that "Diamond had actual notice that this product would explode and spray violently" as is set forth on Page 6 of the Petition.

3. On Page 10 and Page 11, petitioner maintained that Diamond had knowledge of the deficient label of Sexauer. The language used indicates that petitioner's position is that Diamond had this knowledge prior to the accident. There is no proof, at all to support this contention, and it is not correct.

4. On Page 14, it is claimed that the Court of Appeals was in error, in ruling two to one, that the petitioner had not proved a prima facie case against both respondents. The entire court was unanimous in affirming the judgment

in favor of respondent Diamond. Circuit Judge Friendly dissented as to Sexauer, and concurred as to Diamond.

5. The footnote, at Page 17 of the Petition, states: "The record contains clear proof that Diamond knew that Sexauer had deleted vital warnings from the label." If this language is to have any meaning, in this case, it must be read as a statement of fact to the effect that Diamond knew, prior to the occurrence, that Sexauer had deleted vital warnings from the label. This is not correct.

CONCLUSION

The direction of a verdict, in favor of respondent Diamond Alkali Company, did not deprive plaintiff of a jury trial, unconstitutionally, and the affirmance of the judgment entered thereon was proper. The petition for a Writ of Certiorari should be denied.

Dated: New York, New York
August 30th, 1967

Respectfully submitted,

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